dwelt at great length on the integrity and the unity of these three sections as being one complete scheme. This is the central core of the decision — the integrity of sections 4, 5-A and 6 as one complete whole. He emphasised this point again and again in his long judgment (see paragraphs 12, 13, 14, 16 and 17), and finally at paragraph 16 he concluded as follows:—

"Sections 4, 5-A and 6 in our opinion are integrally connected. Section 4 specifies the locality in which the land is acquired and provides for survey to decide what particular land out of the locality should be needed. Section 5-A provides for hearing of objections to the acquisition and after these objections are decided the government has to make up its mind and declare what particular land out of the locality it will acquire. When it has so made up its mind it makes a declaration as to the particular land out of the locality notified in section 4(1) which it will acquire. It is clear from this intimate connection between sections 4, 5-A and 6 that as soon as the Government has made up its mind what particular land out of the locality it requires, it has to issue a declaration under section 6 to that effect. The purpose of the notification under section 4(1) is at this stage over and it may be said that it is exhausted after the notification under section 6."

The effect of holding those three sections as the integral unit in that each is depending upon one another, leads the court to deduce that once a declaration under section 6 is made, the notification under section 4(1) must be exhausted, for it has served its purpose. In other words, the legislative scheme created under Indian Act is that notification under section 4, a subsequent public hearing as to objection under section 5-A and a declaration of public need under section 6 are a complete unit and the effect is that once a process is completed, the Government must begin again. There can never be any declaration under section 6 without a prior notification under section 4. Such being the *ratio decidendi* of *Vishu Prasad's* case, I cannot see how the case is at all relevant to the present case under appeal which is governed by a different legislative effect produced by sections 47, 48 and 60 of the Sarawak Land Ordinance.

Under this Ordinance, land owners are not given the right to oppose the proposed acquisition, and acquisition is perfectly lawful by the Government issuing a declaration under section 48 without having been preceded by a notification under section 47. Sections 47 and 48 are not necessarily, to use the language of Chief Justice Wanchoo, "intimately connected". Because of this difference, section 60 of the Sarawak Legislation gives two dates for the purpose of determining compensation, i.e. the date of notification under section 47, but where there is no such notification the date will be the date of the declaration under section 48. Thus where both notification and declaration are issued, the earlier date must be taken to be the determining date. There cannot be an exhaustion of notification under section 47 because the Sarawak Land Ordinance does not make section 47 and section 48 as forming one integral part. Section 60(1)(a), apart from fixing the date of determination of compensation by giving two alternative dates, whichever is the earlier, implicitly implies that resort to section 48 can be had without relying upon action done under section 47. There is no reason why section 60(1)(a) which is self-explanatory, should not be given its full effect. Further, the various background factors which the judges of the Indian Supreme Court took into consideration in deciding the *Vishu Prasad's* case are not applicable to our case as they are irrelevant in view of the clear wording of section 60.

Hence, with respect, I find myself in disagreement with the decision of Mr. Justice George Seah in applying the principle enunciated by the Indian Supreme Court in *Vishu Prasad's* case to the present case under appeal. Not only the two legislations — Indian and Sarawak — are not identical, though they may have some similarities, but also the Indian decision should not be readily accepted without scrutiny and reservation as the social, economic and political conditions in India, in my view, are vastly different from those available in Malaysia, especially in the matter of sentiments attached to ownership of land. Similar attitude was taken by this court in *Karam Singh* v. *Menteri Hal Ehwal Dalam Negeri*[5] at page 141, *per* Ong Hock Thye C.J.

As to the cross-appeal by the respondent that the learned judge's award as on the date of the declaration under section 48 is still inadequate, this appeal cannot now succeed in view of my ruling that the determining date is the date of notification under section 47. Hence, for reasons given above, I allow the appeal by the Superintendent of Lands and Surveys, and order that the award which the Government should pay to the respondent in respect of the four lots under appeal is as assessed by the learned judge in accordance with the date of notification under section 47. I also order that the appellant should be entitled to costs of this appeal.

Appeal allowed; cross-appeal dismissed.

Solicitors: *Ibrahim & Co.*

SARAWAK ELECTRICITY SUPPLY CORPORATION v. WONG AH SUAN

[F.C. (Lee Hun Hoe C.J. (Borneo), Chang Min Tat & Salleh Abas F.J.J.) April 24 & July 6, 1979]

[Kuching — Federal Court Civil Appeals Nos. 11 & 18 of 1979]

Administrative Law — Licence giving exclusive right of supplying electricity in Saratok, Sarawak — Consent sought from licensee to issue licence to Sarawak Electricity Supply Corporation to supply electricity to suppliers in area — Whether consent unreasonably withheld or refused — Whether right to be heard given to licensee — Audi alteram partem rule — Matter considered by Governor-in-Council — Sarawak Electricity Supply Corporation Ordinance, 1962, ss. 14 & 15.

In this case the respondent had been given a licence giving him the exclusive privilege of supplying electricity to Saratok in Sarawak. The charges made by the respondents were higher than those charged in other areas. Under the Sarawak Electricity Supply Corporation Ordinance, 1962, the Government had a scheme for rural electrification. Under the Ordinance it was provided that the Corporation would not supply electricity to a consumer in an area, which forms part of the area of supply of a licensee, except with his consent. It was also provided that where a licensee refuses or withholds such consent the corporation can appeal to the Governor in Council, who can, if satisfied that such consent has been unreasonably refused or withheld, dispense with such consent. The corporation asked the respondent for consent to supply electricity to some applicants from Seratok but this was refused. The respondent also turned down a request to charge the new rates for the supply of electricity fixed by the Ministry of Communications and Works. The Corporation thereupon appealed to the Governor-in-Council, who after considering the material evidence including the correspondence

between the Corporation and the respondent, found that the consent of the respondent had been unreasonably withheld and refused. Licence was therefore granted to the Corporation. The respondent thereupon bought actions against the Corporation and the Government of Sarawak for various declarations and reliefs on the ground that the licence to the Corporation could only be granted, if his consent was obtained or if the Government was satisfied that his consent had been unreasonably refused or withheld. He claimed that he had not been given the right to be heard before the Governor-in-Council made its decision. At the trial the learned trial judge held that the respondent had not been accorded the right to be heard. He refused an injunction but granted damages to be assessed. The Government and the Corporation thereupon appealed to the Federal Court.

Held: although the *audi alteram partem* rule applied in this case, an adequate opportunity to be heard had been accorded the respondent. The Governor-in-Council had all the material evidence before him to enable him to come to a fair and proper decision and the Governor in Council could have come to no other conclusion than that the licensee's consent had been unreasonably withheld or refused.

Cases, referred to:-

(1) *In re Spensborough Urban District Council's Agreement* [1968] Ch. D. 139; [1967] 1 All E.R. 959.

(2) *Beverley Corporation* v. *Richard Hodgson and Sons Ltd.* (1973) 225 E.G. 799.

(3) *Staffordshire Area Health Authority* v. *South Staffordshire Waterworks Co.* [1978] 1 W.L.R. 1387; [1979] 1 W.L.R. 203.

(4) *Stephen Kalong Ningkan* v. *Government of Malaysia* [1968] 1 M.L.J. 119, 120.

(5) *Cooper* v. *Wandsworth Board of Works* (1863) 14 C.B. N.S. 180.

(6) *Hopkins* v. *Smethwick Local Board of Health* (1890) 24 Q.B.D. 712.

(7) *Smith* v. *The Queen* (1878) L.R. 3 App. Cas. 614 P.C.

(8) *De Vertenil* v. *Knapps* [1918] A.C. 557 P.C.

(9) *University of Ceylon* v. *Fernando* [1960] 1 All E.R. 631 P.C.

(10) *Durayappah* v. *Fernando* [1967] 2 A.C. 337 P.C.

(11) *Ganapathy Chettiar* v. *Periakaruppah Chettiar & Anor.* [1962] M.L.J. 109 P.C.

(12) *Secretary of State for Education and Science* v. *Tameside Metropolitan Borough Council* [1977] A.C. 1015, 1047.

(13) *Secretary of State for Employment* v. *ASLEF (No. 2)* [1972] 2 Q.B. 455.

(14) *Board of Education* v. *Rice* [1911] A.C. 179.

(15) *Najer Singh* v. *Government of Malaysia & Anor* [1974] 1 M.L.J. 138 P.C.

(16) *Ketua Pengarah Kastam* v. *Ho Kwan Seng* [1977] 2 M.L.J. 153.

(17) *B. Surinder Singh Kanda* v. *Government of Malaya & Ors.* [1962] A.C. 322; [1962] M.L.J. 169.

(18) *R.* v. *Norfolk County Council* (1891) 60 L.J. Q.B. 379.

FEDERAL COURT.

Matthew Chan for the Sarawak Electricity Supply Corporation (appellant in F.C.C.A. 11 of 1979).

Denis Ong Jiew Fock (Assistant State Attorney-General) for the Government of Sarawak (appellant in F.C.C.A. 18 of 1979).

Lee Chuan Eng for the respondent.

Cur. Adv. Vult.

Chang Min Tat F.J. (delivered by Lee Hun Hoe C.J. (Borneo) as judgment of the Court): The respondent holds a licence in writing whereby he is given the exclusive privilege of supplying electricity to a fairly extensive area known as Saratok in the State of Sarawak. During the currency of that licence, the Government of Sarawak gave a subsidiary licence to the State Electricity Supply Corporation (SESCO) to supply electricity to certain residents in this area. The respondent consequently took two actions against SESCO and the Government of Sarawak for various declarations and reliefs on the ground that the Government could give such a licence to SESCO only with his consent or if it was satisfied that his consent was unreasonably refused or withheld and that in the absence of his consent and of any opportunity accorded to him to be heard in defence of the exclusive licence granted to him, the subsidiary licence to SESCO was wrongly issued. He had, he says, been denied natural justice and he charged, in particular, that the rule of *audi alterem partem* was breached to his prejudice.

After a lengthy hearing of the consolidated actions and an examination of masses of documents, the learned trial judge in a painstaking judgment agreed with the respondent and he acceded to most of the prayers sought by him. He however refused an injunction to the respondent. He awarded damages instead, but he did not proceed to assess the damages. He also reserved the question of costs. The Government and SESCO appeal to this court from the judgment.

The licence which was for a period of 25 years from January 1, 1961, was issued under the Sarawak Electricity Ordinance (Cap. 137). Under section 4(2) thereof, the Governor of Sarawak may, without prejudice to such rules as he may make for generally carrying out the provisions of the Ordinance under section 36, grant a licence for such periods and under such conditions and with such stipulations as to the exclusive nature thereof or otherwise or generally in such manner as he may deem fit.

The licence is unexceptionable, save perhaps for the absence of any precautionary provision for termination on reasonable notice. The only term necessary to refer to is clause 7(a) which sets out the maximum charges which the licensee may levy for the supply of electricity. These rates may not be increased without the leave of Government.

They are the maximum that could be charged, but to the respondent, they were the minimum that he was willing to charge. With the coming of electrical light and energy to Saratok, there came general discontent among the customers of the licensee over the excessive charges. That there was justification for such discontent can be seen from the fact that today, after the world in general and this country as well, had experienced a serious upsurge in the price of oil, the charge of electricity in West Malaysia for domestic use (generally the category of use with the highest rating) is only 30¢ per unit, which with the present surcharge of an additional 5¢ still makes the licensee's insistence on charging the maximum of 60¢ allowed appear unreasonable to the consumers. Then in October 19, 1971 (before the Arab embargo on oil), the Governor of Sarawak allowed a further increase in the maximum rates which the licensee lost very little time in imposing.

It did not take the people of Saratok long to discover that these rates were twice and in some cases

and at some brackets more than twice those charged elsewhere, e.g. in Sibu (see page 298 of the Appeal Record in Civil Appeal No. 18 of 1979). Oil to the fire of the consequent discontent was added by the imposition of fairly high increases in the charges for installation and by what the consumers or intending consumers felt to be the heartless attitude of the licensee to the needs of the people after a fire had razed a substantial part of the bazaar. It led to numerous petitions by the people of Saratok to the Government to take over the supply of electricity and to a boycott of the licensee's supply, even though it meant a resort to oil or pressure lamps.

Understandably, the petitions to the Government evoked sympathy, since the Government had by now evolved a policy for rural electrification and passed an ordinance known as the Sarawak Electricity Supply Corporation Ordinance, 1962 (the Ordinance) whereby it set up the Sarawak Electricity Supply Corporation (SESCO) and charged it with the duty, *inter alia,* in section 14(1)(c) to promote and encourage the generation of electricity with a view to the economic development of Sarawak and in (d) to secure the supply of energy at reasonable prices. This duty to supply laid down in section 15(1) cannot of course over-ride the rights of licensees granted previously to the passing of the Ordinance and subsection (2) of section 15 specifically provides that SESCO shall not supply energy to a consumer, other than the licensee, in any area, which for the time being forms part of the area of supply of a licensee, except with his consent.

The action that Government took was not to advise itself whether the licence was terminable on reasonable notice, even though granted for a fixed term. It did not direct its attention, *inter alia,* to *In re Spensborough Urban District Council's Agreement,*[1] which was followed in *Beverley Corporation* v. *Richard Hodgson & Sons Ltd.*[2] and in the Court of Appeal in *Staffordshire Area Health Authority* v. *South Staffordshire Waterworks Co.*[3] It did not therefore consider whether the licence did not imply a term giving the Governor power to determine it on reasonable notice after the formulation of the Government's rural electrification programme or after the licensee had shown an unwillingness to fall in line with this policy, for the reasons advanced by Goff and Cumming-Bruce L.JJ., if not for the more adventurous approach of Lord Denning M.R. in the *Staffordshire* case. More's the pity as this case must now be considered to have the approval of the House of Lords since the House's Appeal Committee has now refused leave to appeal: [1979] 1 W.L.R. 203.

The action that Government took was to seek the co-operation of the respondent, then his consent and failing that, to issue a licence (the Sixth Supplemental Electricity Licence) to SESCO to supply electricity to consumers in the area covered by the respondent's exclusive licence. It relied on the provisions of the proviso to section 15(2), which reads

"Provided that where the consent of a licensee is required under this sub-section and such licensee refuses or withholds such consent, the corporation may appeal to the Governor in Council and the Governor in Council, if satisfied that the consent of such licensee is unreasonably refused or withheld, may dispense with such consent,"

upon the footing that the corporation had sought and had been refused the consent of the licensee and the Governor in Council was satisfied that the consent had been unreasonably refused or withheld.

The entire burden of the respondent's complaint is that the Government had taken this view without giving him an opportunity of being heard.

The learned trial judge first examined the question whether the property rights and privileges of the respondent had been adversely affected by this decision, because if they were, the action of the Government then comes under the review by the courts: *Stephen Kalong Ningkan* v. *Government of Malaysia.*[4] Thus, in the case of the demolition of a building, *Cooper* v. *Wandsworth Board of Works*[5] and *Hopkins* v. *Smethwick Local Board of Health*[6] or ejection on an alleged forfeiture of a Crown lease, *Smith* v. *The Queen,*[7] the right to retain indentured labour, *De Verteuil* v. *Knapps,*[8] or a threatened expulsion from the University, *University of Ceylon* v. *Fernando,*[9] or a dissolution of a municipal council, *Durayappah* v. *Fernando*[10] or the sale of partnership assets *Ganapathy Chettiar* v. *Periakaruppah Chettiar & Anor.*[11] — this list is of course not exhaustive — an opportunity to be heard must be given to the party affected or likely to be affected by any administrative or executive action. With respect, we believe that these and other authorities on the same point are so well-known and the principle is so firmly established that we can excuse ourselves from examining these cases in detail and excising large passages therefrom for quotation.

In the case under appeal, it is only too obvious that any action that infringes on the exclusiveness of the respondent's licence to supply electricity must to the extent of that action affect his property rights. Even if the supplemental licence granted to SESCO was limited to supplying electricity only to those who had refused to receive their supply from the licensee, however noble the motive might be or however consonant with the Government's rural electrification programme it was, it in effect injuriously affected the rights of the respondent under the licence, in particular his profitability.

The learned trial judge came to the conclusion that the *audi alteram partem* rule applied in this case. With respect, we entirely agree.

But we would also adopt with respect, at least, two of the three cardinal points laid down by Lord Wilberforce in *Secretary of State for Education and Science* v. *Tameside Metropolitan Borough Council*[12] at page 1047 in dealing with a statute which lays down "if ... is satisfied", reading Governor-in-Council for Secretary of State wherever the latter occurs:

"(2) The section is framed in a 'subjective' form — if the Secretary of State 'is satisfied.' This form of section is quite well known, and at first sight might seem to exclude judicial review. Sections in this form may, no doubt, exclude judicial review on what is or has become a matter of pure judgment. But I do not think that they go further than that. If a judgment requires, before it can be made, the existence of some facts, then, although the evaluation of those facts is for the Secretary of State alone, the court must inquire whether those facts exist, and have been taken into account, whether the judgment has been made upon a proper self-direction as to

those facts, whether the judgment has not been made upon other facts which ought not to have been taken into account. If these requirements are not met, then the exercise of judgment, however *bona fide* it may be, becomes capable of challenge: see *Secretary of State for Employment* v. *ASLEF (No. 2)*[13] *per* Lord Denning M.R., at page 493.

(3) The section has to be considered within the structure of the Act. In many statutes a minister or other authority is given a discretionary power and in these cases the court's power to review any exercise of the discretion, though still real, is limited. In these cases it is said that the courts cannot substitute their opinion for that of the minister: they can interfere on such grounds as that the minister has acted right outside his power or outside the purpose of the Act, or unfairly, or upon an incorrect basis of fact. But there is no universal rule as to the principles on which the exercise of a discretion may be reviewed: each statute or type of statute must be individually looked at."

For the observation of the *audi alterem partem* rule a number of authorities has laid down that so long as an adequate opportunity is given to the affected party to make any relevant statement he may want to make or to answer any statement to his prejudice, no particular form of procedure, where the relevant statute, as in this case, does not prescribe any special form of hearing, needs to be followed. The substance and not the form is the important thing. It is only necessary to refer to two authorities. In *De Verteuil* v. *Knapps, supra,* their Lordships of the Privy Council held that

"The particular form of inquiry must depend on the conditions under which the discretion is exercised in any particular case, and no general rule applicable to all conditions can be formulated. In the particular case under appeal the acting Governor exercised his discretion on a complaint made against the appellant by the Protector of Immigrants with regard to the treatment and condition of indentured immigrants on his La Gloria estate. What is the procedure which in such a case the law will imply when the Legislature is silent? The acting Governor was not called upon to give a decision on an appeal between parties, and it is not suggested that he holds the position of a judge or that the appellant is entitled to insist on the forms used in ordinary judicial procedure. It would not be possible to follow such procedure, since the acting Governor has no power to examine witnesses or to administer an oath. There is, moreover, no allegation that the acting Governor did not act throughout in perfect good faith.

On the other hand, the acting Governor could not properly carry through the duty entrusted to him without making some inquiry whether sufficient grounds had been shown to his satisfaction that immigrants indentured on the La Gloria estate of the appellant should be removed. Their Lordships are of opinion that in making such as inquiry there is, apart from special circumstances, a duty of giving to any person against whom the complaint is made a fair opportunity to make any relevant statement which he may desire to bring forward and a fair opportunity to correct or controvert any relevant statement brought forward to his prejudice. It must, however, be borne in mind that there may be special circumstances which would justify a Governor, acting in good faith, to take action even if he did not give an opportunity to the person affected to make any relevant statement, or to correct or controvert any relevant statement brought forward to his prejudice."

And as their Lordships did in a much later case, *University of Ceylon* v. *Fernando, supra,* at page 639. we adopt the words of Lord Loreburn L.C. in *Board of Education* v. *Rice*[14] at page 182, that the deciding authority was not bound to treat the matter as if it was a trial, had no power to administer an oath and need not examine witnesses, but could obtain information in any way it thought best.

After an intensive and detailed examination of the evidence, the learned trial judge came to the conclusion that "The proceeding before the Governor-in-Council was vitiated when His Excellency completely failed to observe the rule of *audi alteram partem.*" With great respect, it is not entirely clear whether he came to this conclusion because the hearing he had in mind and which in his opinion was denied the respondent was some sort of oral hearing before the Governor-in-Council, but it is now established by unchallengeable authority that an applicant for natural justice is not in every instance entitled as a matter of inalienable or indefeasible right to an oral hearing: *Najar Singh* v. *Government of Malaysia & Anor.*[15] But the question for the trial court is whether there had been such an enquiry to enable the Governor-in-Council to feel satisfied that the consent of the licensee had been unreasonably refused and with respect, the learned trial judge should therefore have considered whether at the proceeding before the Governor-in-Council, there had been a refusal of his consent by the licensee put before the Governor-in-Council, with his reasons for so refusing, if such was the case, and whether opportunities for making any representations that the licensee might want to make were adequately afforded him and such representations had been considered fairly and in good faith and without bias. Since he did not, we now have to examine such of the evidence as is relevant and to consider whether what had been done accords with the requirements of a fair and adequate hearing, bearing in mind what Raja Azlan Shah F.J. (now C.J. Malaya) said in *Ketua Pengarah Kastam* v. *Ho Kwan Seng,*[16] that the hearing may take many forms and strict insistence upon an inexorable right to the traditional court-room procedure can lead to a virtual administrative breakdown.

In the face of the growing discontent, the Chief Electrical Inspector for Sarawak on May 2, 1972 sounded the licensee whether he was willing to surrender his licence voluntarily before the date of expiry. The reply came on May 24, 1972. It was not a flat no. The licensee was willing to surrender his licence to enable the Government to carry out its rural electrification programme for $400,000. The price was however too much and the tone too uncompromising for any further negotiations and the Government did not pursue the suggestion of a surrender.

Then, on July 23, 1973, the Ministry of Communications and Works for Sarawak introduced new electricity tariff rates for adoption by all non-SESCO electricity suppliers. They were a little more than half of what the respondent was charging. They bore a reasonable comparison with the charges elsewhere in the State. The respondent was asked to adopt the new rates. The answer by his solicitors was prompt and definite. It was a flat no. It needs to be set out in full. It reads:

"7th August, 1973.

Secretary,
Ministry of Communications & Works,
Kuching.

Sir,

We act for Mr. Wong Ah Suan of Swan Electrical Works Sdn. Bhd., Abell Road, Kuching who has placed in our hands your letter MCW/1081 (107) dated the 23rd July, 1973, with instructions to reply thereto.

Our client is not prepared to accept the tariff rates set out in your letter under reference and says that the Government,

by setting out the said rates, is acting in contravention of the Licence and the Supplemental Electricity Licence granted to him by successive Governors.

Though facts such as that a copy of your said letter has been sent to the Sarawak Electricity Supply Corporation and that the said Corporation has since written to our client asking for consent pursuant to section 15 of the Sarawak Electricity Supply Corporation Ordinance, seem to suggest that the Government and the Corporation are making a combined effort to make it impossible for the present licensee to supply electrical energy in Saratok in accordance with the tariff rates set out in the said licence/s and to take away his business under that pretext, our client sincerely hopes that the Government is not contemplating such a course.

The introduction by the Government of the tariff rates set out in your letter can only serve to create dissatisfaction among our client's customers/consumers. He, therefore, requests that the Government should withdraw the said letter immediately.

Our client reserves the right to take appropriate legal action to protect his rights.

Yours faithfully,
THOMAS & CO."

As can be seen, it even carries a warning of legal action in its ultimate paragraph. In this letter, the licensee had indicated clearly and in no uncertain terms that he was not willing to supply electricity, upon the terms with which SESCO was willing and able to supply such energy.

Then on August 1973, SESCO advised the respondent that it had received more than 60 applications from Saratok new bazaar, Kampong Melayu Illir and Ulu, and the other outskirts of Saratok Bazaar for electricity supply. The consent of the licensee under section 15(2) of the Ordinance was sought.

The reply came on August 8, 1973. It was also a flat refusal. It again needs to be quoted.

"REGISTERED

8th August, 1973.

General Manager,
Sarawak Electricity Supply Corporation,
P. O. Box No. 149,
Kuching.

Dear Sir,

ELECTRICITY SUPPLY IN SARATOK

We act for Mr. Wong Ah Suan of Swan Electrical Works Sdn. Bhd., Abell Road, Kuching, who has placed in our hands your letter LFY/POF/M12/21 dated the 1st August, 1973, with instructions to reply thereto.

Our client says that he is, and has been, able and willing to supply the requisite energy upon reasonable terms and within reasonable time and that, therefore, he is not prepared to give the consent you seek.

Our client would like to take this opportunity to request you (as he has requested the Government by separate letter in reply to the letter from the Ministry of Communications and Works dated the 23rd July, 1973, addressed to him with copy to you) not to do anything that may directly or indirectly make it difficult for him to continue the supply of electrical energy in accordance with the Licence and the Supplementary Electricity Licence granted to him by successive Governors in 1961 and 1971, respectively.

The Government in acting unreasonably and illegally in purportedly introducing new electricity tariff rates set out in the said letter dated the 23rd July, 1973, for the supply in Saratok, having regard to the fact that the applicable rates are clearly set out in the said Supplemental Electricity Licence — the rates considered reasonable by His Excellency the Governor in 1971 are still undoubtedly reasonable.

Yours faithfully,
THOMAS & CO."

How the licensee could say in his second paragraph that he was willing and able to supply electricity upon reasonable terms was not explained in this letter or in any subsequent correspondence. But apparently it was considered that by charging the maximum he was allowed to charge under the licence as varied, he was being only reasonable. This appears in the last sentence, and also, it must be observed, in all subsequent correspondence. The licensee and his legal advisers have however at all times missed the point that the rates he is empowered to charge are the maximum and what may appear reasonable to him as the supplier in a monopolistic system may well be unreasonable to consumers who have other rates in other places to compare with and who also knew that SESCO would be able to do the job at much lower rates than what the licensee insisted on charging.

It must be mentioned at this stage that the willingness of SESCO to supply electricity at its stated rates would according to its own figures involve it in a loss. This loss it was prepared to bear in the discharge of its duty under the Ordinance. But there is no question that the licensee by supplying electricity to these people at SESCO rates would incur a similar loss. The loss is sustained by SESCO only because of the limited demand from those who boycotted the licensee.

The attitude of the licensee from his solicitor's letters was so intransigent that SESCO quite clearly considered it pointless to seek the co-operation of the licensee and it set about obtaining the dispensation of the licensee's consent. After forwarding all the petitions and pleas of the people of Saratok, and the correspondence with the licensee, SESCO on August 11, 1973, wrote to the Ministry of Communications and Works for dispensation of the licensee's consent under the proviso to section 15(2) of the Ordinance.

Under the Constitution of the State of Sarawak which came into effect on September 6, 1963, Article 5 provides that the executive authority of the state is vested in the Governor who shall be advised by a Supreme Council but executive functions may by law be conferred on other persons. Under Article 10, the Governor acts only on advice and his discretion in the performance of his duties is limited to the appointment of a Chief Minister and the withholding of consent to a request for the dissolution of the Council Negri. The form of government is ministerial and the proper person to advise the Governor is therefore the Minister of Communications and Works in whose portfolio the Ordinance lies. The chain of communications is therefore established from the licensee to the Governor through the Minister and by this line, the refusal of the licensee to give his consent for the reasons so clearly and fully set out in his solicitor's letters was communicated to the Governor.

It was not his case that the Governor has in any way acted in bad faith or shown any bias. He explicitly absolves the Governor-in-Council from such accusations. Neither was it his case that a charge has been made against him or evidence in support of such a charge has been adduced against him in his absence: and he has been denied adequately the means to meet such a charge or answer such evidence as in, *inter alia*,

B.S.S. Kanda v. *The Government of Malaysia & Ors.*[17] and the cases cited previously. Neither was it the case of a fair opportunity of correcting or contradicting any statement prejudicial to him. If it had been possible for him to be accorded an oral hearing and he had gone before the Governor-in-Council or if he had been asked what further representations, if any, he had to make, could he have said anything more than what he had said in his letters to SESCO, that he holds a licence for a determinate and irreducible term, that he was allowed to make certain charges, that he had therefore a right to make these charges and because of these privileges he enjoyed as a matter of grant he was not prepared to reduce the charges or to give his consent to be replaced?

If he had nothing he could possibly add to what had already been said for him, the conclusion is inevitable that the Governor-in-Council then had all the material evidence before him to enable him to come to a fair and proper decision. More so, as in this particular case, his approach need not be subjective and his decision is not dependent on any particular view open to him to take on the evidence. Subsection (3) of section 15 of the Ordinance which reads

"15(3) For the purposes of the proviso to subsection (2), consent shall be deemed to be unreasonably refused or withheld if the licensee is not willing and able to supply the requisite energy upon reasonable terms and within a reasonable time, having regard, amongst other things, to the terms upon, and the time within, which the Corporation is willing and able to supply such energy."

lays down a strictly objective test and if the evidence is, as it clearly was in this case, that the licensee is, among other things, not willing to supply the energy required upon the terms which SESCO is willing and able to offer, then the licensee's consent, however he may in his own light think it reasonable to refuse or withhold, is deemed (see the definition of "deemed to be" per Cave J. in *R.* v. *Norfolk County Council*[18] at page 380) to be and is unreasonably refused or withheld. Though it is not part of the normal duty or function of the courts to review the decision of the executive, when the rules of natural justice had been observed, we would in the peculiar circumstances of this case allow ourselves a remark that on the evidence, the Governor-in-Council could have come to no other conclusion than that the licensee's consent had been unreasonably withheld or refused, according to the test laid down in section 15(3).

It will be seen that we differ from the learned trial judge only on the score whether an adequate opportunity to be heard had in fact been accorded the licensee. It seems to us reading his judgment as a whole, that this is only so because he had, with respect, failed to deal with this question adequately or perhaps not even at all.

The appeal is allowed with costs both here and in the High Court. The claims of the respondent in both actions stand dismissed.

Appeal allowed.

Solicitors: *Chan, Jugah, Wan Ullok & Co.; Ee & Lim.*

PHANG CHIN HOCK v. PUBLIC PROSECUTOR

[F.C. (Suffian L.P., Wan Suleiman & Syed Othman F.JJ.) June 28 & August 21, 1979]

[Kuala Lumpur — Federal Court Criminal Appeal No. 27 of 1977]

Criminal Law and Procedure — Unlawful possession of ammunition — Trial in accordance with Essential (Security Cases) Regulations, 1975 — Regulations validated by Emergency (Essential Powers) Act, 1979 — Power of Parliament to amend Constitution — Whether Act valid — Internal Security Act, 1960, s. 57.

Constitutional Law — Power of Parliament to amend Constitution — Rule of harmonious construction — Basic structure of Constitution — Judicial power of Courts — Whether Emergency (Essential Powers) Act, 1979 valid — Emergency (Essential Powers) Act, 1979, ss. 2(4), 9(3) & 12 — Federal Constitution, arts. 4(1), 45, 149, 150.

The appellant had been convicted of the offence of unlawful possession of ammunition and sentenced to death. He was tried in accordance with the Essential (Security Cases) Regulations, 1975, which were held to be invalid in *Teh Cheng Poh* v. *Public Prosecutor*[10] but were subsequently validated by the Emergency (Essential Powers) Act, 1979. In the appeal by the appellant it was argued that (a) any Act of Parliament which amends the Constitution, as is allowed by Article 159 of the Constitution, is valid only if consistent with the Constitution and that any provision in it which is so inconsistent, is to the extent of the inconsistency, void; (b) even if the amendments made by Parliament in accordance with article 159 may be inconsistent with the existing provisions of the Constitution, the court should read into the Constitution implied limitations on the power of Parliament to destroy the basic structure of the Constitution; (c) even if the Emergency (Essential Powers) Act, 1979 is valid, sections 2(4), 9(3) and 12 thereof are void as they destroy the basic structure of the Constitution.

Held: (1) Parliament have power to make constitutional amendments that are inconsistent with the Constitution. In construing Article 4(1) and Article 159 the rule of harmonious construction requires the court to give effect to both provisions;

(2) Parliament may amend the Constitution in any way they think fit, provided that they comply with all the conditions precedent and subsequent regarding manner and form prescribed by the Constitution itself;

(3) it is unnecessary in this case to decide whether or not Parliament's power of constitutional amendment extends to destroying the basic structure of the Constitution;

(4) the Emergency (Essential Powers) Act, 1979, is constitutional. Whatever may be the features of the basic structure of the Constitution, none of the constitutional amendments complained of and none of the impugned provisions of the Act have destroyed the basic structure of the Constitution.

Cases referred to:-

(1) *Kesavananda Bharati* v. *State of Kerala* [1973] S.C.R. Supp. 1; A.I.R. 1973 S.C. 1461.

(2) *Shankari Prasad Singh Deo and Others* v. *The Union of India and Others* A.I.R. 1951 S.C. 458.

(3) *Sajjan Singh* v. *State of Rajasthan* A.I.R. 1965 S.C. 845.

(4) *I.C. Golak Nath & Others* v. *State of Punjab* (1967) 2 S.C.R. 762; A.I.R. 1967 S.C. 1643.

(5) *Loh Kooi Choon* v. *Government of Malaysia* [1977] 2 M.L.J. 187.

(6) *Bribery Commissioners* v. *Ramasinghe* [1965] A.C. 172, 198.

(7) *Bank of Toronto* v. *Lambe* (1887) 12 App. Cas. 575, 586.

(8) *Attorney-General of Ontario* v. *Attorney-General of Canada* [1912] A.C. 571, 582.

(9) *Attorney-General for Alberta* v. *Attorney-General for Canada* [1939] A.C. 117, 123-5.

(10) *Teh Cheng Poh* v. *Public Prosecutor* [1979] 1 M.L.J. 50.

(11) *Piare Dusadh* v. *Emperor* A.I.R. 1944 F.C. 1.